S.1951. Establishing liability for clean-up of unlisted[1] substance releases that lead to a federal response under CERCLA.

Policy Objective

Establish clear liability under CERCLA for federal/state costs incurred responding to imminent and substantial danger to the public health or welfare arising from a release of a pollutant – even if the pollutant is not designated as a hazardous substance.

Background

In September 2013, a pipeline carrying molasses from Hawaii to cargo ships leaked 233,000 gallons of molasses into the waters of Honolulu Harbor. Because of the size and impact of the release, the Coast Guard, the U.S. EPA, and the National Oceanic and Atmospheric Administration joined the Hawaii Department of Health to respond and try to minimize damage. The disaster killed over 20,000 fish and more than a thousand colonies of coral. Because molasses is not a designated hazardous material, the company responsible for the spill is not legally liable for clean-up costs under CERCLA.

In January 2014, a leaking storage tank released about 7,500 gallons of a chemical called *4-methylcyclohexane methanol* (MCHM) into the Elk River in West Virginia. The spill led to a tap water ban for about 300,000 people in nine counties. Because MCHM is not a designated hazardous material, the company responsible for the spill is not legally liable for clean-up costs under CERCLA.

Congress enacted the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 to authorize the federal government to clean contaminated sites in the United States and to make "potentially responsible parties" financially liable for the cleanup costs. Although CERCLA primarily focuses on releases of designated hazardous substances, it also provides authority for federal response to releases of "pollutants" or "contaminants" that are not designated as hazardous substances.[2] CERCLA can be invoked to help pay for federal response actions and the participation of states[3] in response to a release of a "contaminant" or "pollutant" if the lead federal agency[4] determines that it "may present an imminent and substantial danger to the public health and welfare."

Responsible parties are liable for the costs of removal, natural resource restoration, or health studies that are necessitated by releases of designated hazardous substances under CERCLA.

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[1] "Unlisted" refers to substances that are not listed as designated hazardous substances under Section 101(14) of CERCLA.

[2] Section 101(33) of CERCLA defines the term "pollutant or contaminant" to include substances that are not otherwise designated as hazardous substances, but that after release into the environment, may cause death, disease, cancer, behavioral abnormalities, physical malfunctions, deformations, or certain other effects. Section 104(a) authorizes federal response actions to address imminent and substantial danger to the public health or welfare arising from releases of pollutants or contaminants.

[3] A state may receive Superfund monies if the state is carrying out actions that are part of the federal response, in accordance with the regulations of CERCLA under the National Oil and Hazardous Substances Pollution Contingency Plan (40 CFR Part 300).

[4] As delegated by Executive Order 12580, EPA generally is the lead agency in the inland zone, and the U.S. Coast Guard is the lead agency in the coastal zone. In the event of a release of a pollutant or contaminant, EPA or the U.S. Coast Guard within their respective zones generally would determine whether the level of danger warranted federal response actions.

However, under CERCLA, the responsible party cannot be forced to pay for removal, restoration, or health studies that result from releases of unlisted contaminants or pollutants. As the Hawaii and West Virginia incidents demonstrated, releases of unlisted pollutants can have devastating impacts on human health and the environment. The absence of authority under CERCLA to hold polluters liable for clean-up costs of releases that are serious enough to warrant a federal response is a deficiency in existing law. It leaves taxpayers to foot the bill even when the responsible party is negligent and regardless how much damage the release may cause.

S.1951 would make responsible parties liable for all costs of removal and for health studies needed after a release of unlisted "contaminants" or "pollutants" (as defined by CERCLA) that causes enough threat to human health and welfare to result in a federal response.